



**U.S. Citizenship
and Immigration
Services**

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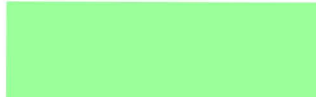


Date: **MAR 13 2013**

Office: NEBRASKA SERVICE CENTER

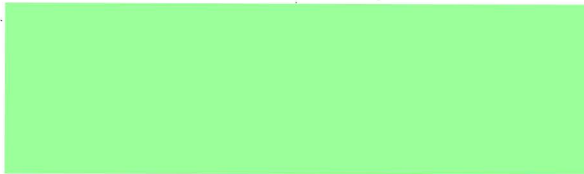
FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was a media business. It sought to employ the beneficiary permanently in the United States as a market research analyst. As required by statute, ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated July 12, 2011, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on May 13, 2008. The proffered wage as stated on the ETA Form 9089 is \$50,274.00 per year. The ETA Form 9089 states that the position requires a master's degree in economics and 24 months of experience in the job offered. A foreign educational equivalent is also acceptable.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

As a threshold issue, on October 31, 2012, this office notified the petitioner that, according to the California Secretary of State's official website, the petitioner's status in the state of California was "suspended." The AAO requested that the petitioner provide proof that its business is currently in active status. The petitioner was directed to respond to the Request for Evidence (RFE) within forty-five days of the notice. In response to the RFE, the petitioner's owner stated in a letter that the petitioner was closed down on December 31, 2010, and that the owner established a new business, [REDACTED] in December 2010.² He further stated that the newly established business involved the same business activity as the petitioner, and that the owner decided to transfer the beneficiary's employment from the petitioner to the newly established business. As evidence, the petitioner provided a copy of the petitioner's Certificate of Cancellation, a copy of [REDACTED] business status from the California Secretary of State's website, Articles of Incorporation for [REDACTED] and By Laws, and its business license.

The petitioner implies that [REDACTED] is a successor-in-interest to [REDACTED]. Contrary to the petitioner's contentions, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor employer. Second, the successor must demonstrate that the job opportunity is the same as originally

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

² Counsel appears to misdescribe these events as taking place in 2012 in his letter dated December 10, 2012.

offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm'r 1986).

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay the proffered wage. The successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the successor must establish its ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); see also *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482.

The record contains no evidence to establish a valid successor-in-interest relationship. There is no evidence of the organizational structure of the predecessor prior to the transfer, or the current organizational structure of the successor. The evidence does not establish that [REDACTED] Inc. acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. Although the petitioner's owner stated that Thai Media and NAT TV LLC involve the same business activity, there is no evidence in the record to substantiate this claim. The evidence does not establish that the successor is continuing to operate the same type of business as the predecessor or that the job duties of the beneficiary are unchanged. The evidence does not establish that the manner in which the business is controlled by the successor is substantially the same as it was before the ownership transfer.

The fact that [REDACTED] is owned and operated by the same person or share the same address is not sufficient to establish a successor-in-interest relationship. Therefore, the evidence in the record is not sufficient to establish that Thai Media is a successor-in-interest to the petitioner. As noted in the RFE, the current status of NAT TV LLC is suspended; therefore, the petition and the appeal to the AAO have become moot. Thus, the petition is not accompanied by a valid labor certification. 20 C.F.R. § 656.30(c)(2); 8 C.F.R. § 204.5(k)(4). The job opportunity no longer exists. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Even if the AAO were to accept the claimed successor-in-interest relationship, the petitioner has failed to demonstrate its continuing ability to pay the proffered wage.

The evidence in the record of proceeding shows that the petitioner was a limited liability company (LLC).³ On the petition, the petitioner claims that it was established on January 1, 2003 and that it currently employs 8 workers. On the ETA Form 9089, signed by the beneficiary, the beneficiary does not claim to be employed by the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner did not provide evidence that it paid wages to the beneficiary in 2008, 2009, and 2010. The petitioner submitted a copy of two company checks issued to the beneficiary on April 16, 2011 in the amount of \$2,046.68 and on April 30, 2011 in the amount of \$2,046.68. However, as this was after the petitioner allegedly closed down its business, the credibility of these checks as representing wages is called into question.

In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of

³ An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election.

depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The proffered wage is \$50,274.00. The petitioner's federal income tax returns, Schedule C to the sole member's 2008 Form 1040 and two Forms 1065⁴, stated its net income as detailed below:

- In 2008, the Schedule C stated net income of -\$46,307.00.
- In 2009, the Form 1065 stated net income of -\$40,766.00.
- In 2010, the Form 1065 stated net income of \$16,121.00.
- In 2011, neither the petitioner nor its claimed successor provided its tax return.

Therefore, for the years 2008, 2009, and 2010, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ An LLC's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. If the total of a LLC's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax return demonstrates its end-of-year net current assets as shown in the table below:

- In 2008, the petitioner did not submit evidence of its net current assets.
- In 2009, the Form 1065 stated net current assets of \$10,608.00.
- In 2010, the Form 1065 stated net current assets of \$16,771.00.
- In 2011, neither the petitioner nor its claimed successor provided its tax return.

Therefore, for the years 2008, 2009, and 2010, the record shows that the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of

⁴ For an LLC, where an LLC's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where an LLC has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In this matter, the director failed to use the figures on line 1 of the Analysis of Net Income (loss) of the Schedule K.

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director's decision is based on an incorrect interpretation of the petitioner's financial records, and that the petitioner has provided evidence sufficient to show that it has the ability to pay the proffered wage.

Counsel infers that the petitioner's bank account balances should be considered in determining the petitioner's ability to pay the proffered wage. The petitioner submitted copies of its bank statements for 2010 and the first quarter of 2011; despite its alleged closure in December 2010. Contrary to counsel's claim, reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence enumerated in 8 C.F.R. § 204.5(g)(2) required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable, unavailable, or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that may not have been reflected on its tax returns.

The petitioner provided unaudited financial statements for 2009 and 2010. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel asserts on appeal that the petitioner relocated his business between 2007 and 2008, and that as a result, the improvement project interrupted its broadcasting and its other operations for a period of time. Counsel further asserts that the temporary interruptions caused a decline in income. Counsel claims that the petitioner provided a letter from a CPA explaining why it was that the petitioner does not need to file Form 1120 tax returns; however, no such letter is contained in the record of proceeding. Furthermore, there has been no evidence submitted to substantiate counsel's claims with respect to the petitioner's alleged improvement project. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel asserts that the petitioner's gross receipts were \$203,975.00 in 2009 and \$757,895.00 in 2010, which is sufficient to pay the proffered wage amount in those years. Although counsel claims that the petitioner's gross receipts are substantial and have increased over time, reliance on the

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petitioner's gross receipts to establish the petitioner's ability to pay the proffered wage is misplaced. As noted above, USCIS properly relies on the petitioner's net income, as stated on the petitioner's corporate tax returns. *River Street Donuts, LLC v. Napolitano*, 558 F.3d at 116; *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. In addition, reliance on the petitioner's future receipts is misplaced. Showing that the petitioner's gross receipts are expected to exceed the proffered wage is insufficient. A petitioner must establish its ability to pay from the date of the priority date, which in this case is May 13, 2008. A petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45-49 (Comm. 1971). Finally, the petitioner has not shown through objective, audited financial documents that the anticipated increase in income will be significant enough to allow it to pay the beneficiary's wage. In any event, the petitioner has closed down and is out-of-business.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel's assertions and the evidence presented on appeal do not outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of

years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in the relevant years. There are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has failed to demonstrate the occurrence of any uncharacteristic business expenditures or losses in the relevant years that would have directly affected its ability to pay the proffered wage. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the ETA Form 9089. Overall, the record is not persuasive in establishing that the job offer was realistic. Finally, as noted above, the petitioner closed its business in December 2010.

Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a master's degree in economics and 24 months experience in the job offered, market research analyst. The labor certification also indicated that the petitioner was willing to accept a foreign educational equivalent. The record of proceeding contains a copy of the beneficiary's master's degree in economics. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a consul/market research analyst.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(e)(1). The record contains an employment letter from the [REDACTED] in which it is stated that the beneficiary was employed by the [REDACTED]

The declarant did not provide a specific description of the beneficiary's job duties. Nor does the declarant indicate that the beneficiary was employed as a market research analyst, as required on the labor certification. See 8 C.F.R. § 204.5(g)(1). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is May 13, 2008. See *Matter of Wing's Tea House*, 16 I&N Dec. 158. The petitioner has failed to establish the beneficiary's qualifications as of the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.